The court also held that the discretionary function exception barred petitioners' FTCA claims (Pet. App. 50a-55a), including those submitted by FSC on behalf of FSA. The court determined that "the RTC's actions involved elements of choice and judgment," *id.* at 54a, and "were related directly to public policy considerations regarding federal oversight of the thrift industry," *id.* at 55a.

The court also dismissed petitioners' claim based on allegations that RTC was engaged in non-governmental commercial activity. The court declined "to open a gaping hole in FTCA jurisprudence by excluding from the Act's coverage all 'nongovernmental activity in commerce.'" Pet. App. 55a. The court also concluded that the actions of federal regulators in this case "cannot be considered 'nongovernmental activities.'" *Id.* at 56a.[3]

4. The court of appeals affirmed. Pet. App. 1a-36a. The court held that petitioners had waived their argument, made for the first time on appeal, that a provision of the Bankruptcy Code, 11 U.S.C. 106, furnished an independent waiver of the government's sovereign immunity from this suit. Pet. App. 6a-8a. The court further held that petitioners' claims against the United States are barred by the discretionary function exception. *Id.* at 8a-34a.[4]

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provisions by nominally characterizing their requested relief as equitable in nature." Pet. App. 48a.

[3] The court further determined that petitioners could not assert common-law tort claims directly against the FDIC. The court held that petitioners' claims are "cognizable" under 28 U.S.C. 1346(b) and that the FTCA therefore provides the exclusive basis for seeking relief. Pet. App. 57a-59a; see 28 U.S.C. 2679(a).

[4] The court of appeals also held that the FTCA bars petitioners' tort claims against the FDIC. Pet. App. 35a-36a. The court did not address several other issues. *Id.* at 5a n.5.

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioners' tort claims. The court's decision does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. The FTCA is a limited waiver of sovereign immunity for certain tort actions against the United States. See 28 U.S.C. 1346(b), 2674. A principal limitation on that waiver of immunity is the discretionary function exception, which immunizes the United States from tort liability for discretionary policy choices made by its employees. Under that exception, courts may not hold the United States liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

An action is protected by the exception if (1) "it involves an element of judgment or choice," and (2) the judgment "is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy *specifically prescribes* a course of action" as to the decision at issue. *Ibid.* (emphasis added). The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial

'second-guessing'" of decisions "grounded in social, economic, and political policy").

The court of appeals correctly held that RTC's management of FSA's affairs as its conservator satisfied both requirements for application of the discretionary function exception. In *Gaubert*, this Court held that the discretionary function exception protects a wide variety of decisions rendered by federal officials in the course of supervising a troubled financial institution. As the Court explained, "[d]ay-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest." 499 U.S. at 325. Like the actions of the federal regulators in *Gaubert*, RTC's actions at issue here in selling certain of FSA's assets plainly "involved the exercise of choice and judgment." *Id.* at 331. And, in exercising that judgment, RTC, like the regulators in *Gaubert*, was implementing the congressional and regulatory policies of preserving the federal insurance fund and promoting continued public confidence in the banking system. See *id.* at 332; Pet. App. 56a. Thus, RTC's operational decisions at issue here as conservator of FSA involved "the kind of policy judgment that the discretionary function exception was designed to shield." 499 U.S. at 332.

b. Petitioners concede that "the management and operation of a financial institution entails the exercise of discretion on a regular and ongoing basis" and do not contest that RTC's actions involved the exercise of "policy judgment." Pet. 9. Petitioners contend (Pet. 6-13), however, that RTC's actions were not protected by the discretionary function exception because "RTC's conduct was a direct violation of its mandate." Pet. 7. That contention lacks merit.

RTC was created as part of Congress's response to the "deteriorating condition of the thrift industry" in the United States. H.R. Rep. No. 54, 101st Cong., 1st. Sess. Pt. 1, at 304 (1989). Congress authorized the Director of the Office of Thrift Supervision to appoint RTC to serve as conservator of troubled savings and loan associations, see 12 U.S.C. 1464(d)(2), and vested RTC with broad statutory authority. RTC generally was given "the same powers and rights" with respect to thrift institutions within its jurisdiction as the FDIC was given under 12 U.S.C. 1821, 1822, and 1823 with respect to depository institutions insured by the FDIC. 12 U.S.C. 1441a(b)(4)(A). Accordingly, RTC as conservator was authorized to "take such action as may be (i) necessary to put the insured depository institution in a sound and solvent condition; and (ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution." 12 U.S.C. 1821(d)(2)(D). RTC was further authorized to "(i) exercise all powers and authorities specifically granted to conservators * * * under [Chapter 16 of Title 12] and such incidental powers as shall be necessary to carry out such powers; and (ii) take any action authorized by [Chapter 16 of Title 12], which [RTC] determines is in the best interests of the depository institution, its depositors, or [RTC]." 12 U.S.C. 1821(d)(2)(J); see 12 U.S.C. 1441a(b)(4)(A).

Despite RTC's broad statutory discretion, petitioners claim that RTC exceeded its authority as conservator by commencing "a course of conduct that constituted a liquidation of FSA's business." Pet. 6. But the facts alleged in petitioners' complaint do not demonstrate that RTC acted outside its authority. Although petitioners referred to RTC's sale of certain securities and other assets held by FSA, Congress expressly per-

mitted RTC as conservator to sell assets of institutions over which it exercised authority. See 12 U.S.C. 1821(d)(2)(G)(i)(II); 12 U.S.C. 1441a(b)(4)(A); see also C.A. App. 203 (RTC, *Conservator's Operating Manual* (Jan. 1992)) (referring to "strategies for marketing and disposing of assets in a manner that expedites asset sales, and prepares conservatorships for eventual sale or resolution"). Petitioners failed to explain how the asset sales and other alleged conduct exceeded RTC's authority or why the conduct constituted an impermissible "liquidation" for purposes of federal law.[5]

In essence, petitioners contend that RTC abused its discretion by exercising its broad authority in a manner that ultimately made it necessary to liquidate FSA. But the discretionary function exception by its terms applies "whether or not the discretion involved be abused." 28 U.S.C. 2680(a); see also *Gaubert*, 499 U.S.

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[5] After holding that RTC's conduct was "facially authorized" (Pet. App. 18a), the court of appeals further considered whether the conduct nonetheless could be challenged under the FTCA if it was performed in bad faith. The court of appeals concluded that the discretionary function exception bars such a challenge and establishes what "amounts to an irrebuttable presumption that an employee ordered or required by law to perform a discretionary function, and whose acts are facially consistent with that function, did try in good faith to perform it." *Id.* at 33a. Even if the discretionary function exception does not create an irrebuttable presumption of good faith, the court of appeals correctly dismissed petitioners' claims. As the court of appeals recognized (*Id.* at 11a-18a), RTC had the discretion as conservator to engage in the asset sales and other conduct alleged in the complaint. And it is well established that the conduct of government officials is accorded a rebuttable presumption of regularity. See, *e.g.*, *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991); *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926). Petitioners made no specific allegations to rebut that presumption.

at 338 (Scalia, J., concurring in part and concurring in the judgment). Thus, even if RTC abused its discretion in a way that led to FSA's liquidation, that would not give rise to a cause of action under the FTCA.

c. Petitioners also contend that they "asserted violations of specific, mandatory policies." Pet. 11; see also Pet. 7 (referring to "specific, detailed violations of mandatory rules"). The court of appeals, however, held that "most of the requirements on which [petitioners] focus are not specific and mandatory" (Pet. App. 12a) but state only "general goals, or sets of objectives to balance" (*id.* at 13a). The court identified one policy statement that might qualify as a "specific and mandatory directive" (*id.* at 14a) but concluded that petitioners had not alleged that RTC's purported disregard of that directive caused them any injury. *Id.* at 14a-17a. The court of appeals therefore correctly concluded that petitioners had not alleged that RTC acted contrary to a "course of action" "specifically prescribe[d]" by a "federal statute, regulation, or policy" so as to remove its conduct from the discretionary function exception. See *Berkovitz*, 486 U.S. at 536.

Thus, contrary to petitioners' contention (Pet. 9-10), this case is quite different from *Berkovitz*. In *Berkovitz*, a specific statute and regulation made clear that federal officials could not issue a license for the production of an oral polio vaccine without first receiving relevant test data from the manufacturer. 486 U.S. at 541, 542. In addition, a statute and a regulation expressly provided that such licenses could be issued only upon a showing that the products satisfy applicable regulatory standards. *Id.* at 541-542. In light of those particularized mandates, the Court held that the discretionary function exception would not bar a claim based on a decision to issue a license without having

received the required data. *Id.* at 543. The Court also held that the discretionary function exception would not bar claims based on allegations that a license was approved (1) without first determining whether the vaccine complied with regulatory standards or (2) after determining that the vaccine did not comply with such standards. *Id.* at 543-544. Here, by contrast, petitioners' alleged injuries were not caused by a failure to adhere to specific and mandatory statutory or regulatory provisions that removed discretion from RTC employees.

2. Petitioners next claim (Pet. 13-17) that the decision of the court of appeals conflicts with this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). Petitioners are incorrect.

Winstar involved the scope of the government's liability with respect to claims under *contract* rather than tort law. The plurality in *Winstar* noted that the government is held to many of the same contractual responsibilities as private parties, observing that "when the United States 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.'" 518 U.S. at 895 n.39 (opinion of Souter, J., joined by Stevens, O'Connor, & Breyer, JJ.) (quoting *Cooke* v. *United States*, 91 U.S. 389, 398 (1875)).

By contrast, when, as here, the government performs discretionary regulatory functions, there is no remedy in tort for persons who allege to have been adversely affected. That is the very purpose of the discretionary function exception. See *Gaubert*, 499 U.S. at 323; *Varig Airlines*, 467 U.S. at 813-814. The Court's decision in *Winstar* did not alter the scope of the government's liability under the FTCA. See Pet. App. 35a.

Petitioners err in asserting (Pet. 14) that the actions of RTC as conservator were "non-governmental" in character. As the court of appeals recognized, the "central premise" of this Court's decision in *Gaubert* was that "oversight of financial institutions generally entails discretion of the sort protected by the [discretionary function] exception." Pet. App. 35a. And, as the district court concluded, "[a]lthough some of the tasks that the RTC undertook in its roles as conservator and receiver of FSA may have been proprietary in nature, the agency ultimately acted in a regulatory capacity pursuant to a regulatory scheme." *Id.* at 56a. Indeed, the RTC was vested with express statutory authority to serve as conservator of institutions such as FSA. See 12 U.S.C. 1464(d)(2).

Petitioners' reliance (Pet. 15-16) on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), is misplaced. The Court in that case refused to recognize a distinction between "governmental" and "non-governmental" conduct for purposes of determining liability under the FTCA. *Id.* at 65-68. And, as the Court subsequently made clear, the decision in *Indian Towing* was based on the conclusion that the conduct under challenge "did not involve any permissible exercise of policy judgment." *Gaubert*, 499 U.S. at 326. Here, by contrast, RTC's conduct was discretionary and susceptible to policy analysis for the reasons discussed above.

3. Finally, petitioners contend (Pet. 17-24) that the court of appeals erroneously refused to consider their argument that a provision of the Bankruptcy Code, 11 U.S.C. 106, waives the government's sovereign immunity with respect to the claims presented in this case. Petitioners made that argument for the first time in the court of appeals and, in fact, asserted a directly contrary position in the bankruptcy court. See Mem. in

Opp. to Def.'s Mot. to Dismiss at 6, *Franklin Sav. Corp.* v. *United States*, No. 93-7001 (Bankr. D. Kan. Jan. 18, 1994) ("Section 106 does not and cannot apply to claims originating under non-bankruptcy law. FSC's claims here derive from the Federal Tort Claims Act which explicitly waives sovereign immunity."). The court of appeals acted well within its discretion in declining to consider petitioners' argument.

Petitioners place principal reliance (Pet. 17-19) on cases in which courts have resolved challenges to subject matter jurisdiction raised for the first time on appeal. As the court of appeals recognized (Pet. App. 6a-7a), however, those cases involve fundamentally different concerns from those presented here. "Federal courts are courts of limited jurisdiction." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); see *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). To ensure that the judiciary does not exceed the limitations on its authority, the general rule against entertaining arguments raised for the first time on appeal is relaxed, and an argument that a court lacks subject matter jurisdiction can be raised at any point in the litigation. See, *e.g.*, *Jefferson* v. *City of Tarrant*, 522 U.S. 75 (1997). Indeed, the limits are so fundamental that they "must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG* v. *Marathon Oil Co.*, 119 S. Ct. 1563, 1570 (1999).

Here, however, petitioners do not contend that the courts lack subject matter jurisdiction. To the contrary, petitioners argue that Section 106 is an independent waiver that can *support* the exercise of jurisdiction over their tort claims. The court of appeals had the discretion to treat that contention just as it would any non-jurisdictional argument raised for the first time on

appeal. The court of appeals' application in this case of the general rule against consideration of such arguments absent extraordinary circumstances does not warrant this Court's review.

Petitioners also rely (Pet. 19-21) on cases holding that an appellate court may, in its discretion, consider bases for subject matter jurisdiction that were not formally asserted in the complaint or raised in the trial court. Similarly, petitioners cite cases (Pet. 20) recognizing the more general principle that an appellate court may, in its discretion, consider legal arguments raised for the first time on appeal. That an appellate court has such discretion is, of course, in no way inconsistent with its decision not to exercise that discretion, the decision that the court of appeals made here.

Petitioners' reliance (Pet. 22-24) on 28 U.S.C. 1653 is misplaced for the same reason. Section 1653 provides that "[d]efective allegations of jurisdiction *may* be amended, upon terms, in the trial or appellate courts." 28 U.S.C. 1653 (emphasis added). The statute is phrased in permissive rather than mandatory language. Even assuming that Section 1653 provided the court of appeals with the authority to consider petitioners' legal argument, that statute did not require the court of appeals to exercise that authority.[6]

In any event, petitioners' argument that Section 106 can be invoked to circumvent limitations on the waiver of immunity in the FTCA lacks merit. Although Section 106 is a waiver of sovereign immunity inde-

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[6] It is not clear that Section 1653 governs the consideration of petitioners' new *legal* argument. The statute's central concern is the correction of inadequate *factual allegations* made in support of jurisdiction. See *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 830-832 (1989).

pendent of the FTCA, that waiver does not create substantive rights or expose governmental units to previously unrecognized liabilities. To the contrary, Congress has explicitly provided that "[n]othing in [Section 106] shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C. 106(a)(5). And both the House and Senate reports accompanying the original enactment of Section 106 stated that the statute was intended to "achieve approximately the same result that would prevail outside of bankruptcy." H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 29-30 (1978). In enacting Section 106, Congress did not intend to enable a debtor to manufacture a tort action against the United States that would otherwise not exist by filing for bankruptcy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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